

PLEA COLLOQUY

1. Clerk places defendant under oath
2. Do you understand that you are now under oath and that if you answer any of my questions falsely, your answers may later be used against you in another prosecution for perjury or making of a false statement?

! Please state your name.

! How old are you?

! How far did you go through school?

! Do you read and write the English language?
3. Consent to Magistrate Judge. The first thing that you should understand is that you have the right to have this hearing presided over by a United States District Court Judge. I am a United States Magistrate Judge and I preside over these guilty plea proceedings only with the consent of the parties. Is that procedure acceptable to you?
4. Have you ever suffered from or been treated for a mental illness? Have you ever suffered from or been treated for addiction to controlled substances of any kind?
5. Are you currently under the influence of any drug, medicine, or alcohol?
6. Do you suffer from any disorder or ailment which interferes with your ability to understand these proceedings?

7. Waiver of Indictment. Under the Fifth Amendment to the United States Constitution, you have the absolute right to have this matter presented to a federal grand jury before you can be charged with a felony criminal offense. Because that never happened in your case, I want to talk to you about what a grand jury is and what a grand jury does. A grand jury is a group of 16-23 people selected at random from the community. They sit here approximately once a month for two reasons. First, the grand jury investigates crime. Second, if, after listening to some or all of the government's evidence, the grand jury finds that there is probable cause to believe that a person has committed a crime, then they return an indictment. Again, the Fifth Amendment to the United States Constitution guarantees that any federal felony offense must be brought by way of indictment.

! Do you understand what a grand jury is and what a grand jury does?

! Is the process of requiring the government to present this matter to the grand jury a right that you are willing to waive or give up?

! [The court makes a finding concerning waiver of indictment.]

8. Have you received a copy of the indictment?

! Are you fully familiar with the charge or charges against you?

! Have you discussed the charges as well as the evidence in the case with your attorney?

! Have you discussed possible defenses to these charges?

! Are you fully satisfied with the counsel representation and advice given to you in this matter by your attorney?

- ! Court asks counsel, “Did you have access to the government’s discovery materials in preparation for these proceedings?”

PLEA AGREEMENT:

9. Court asks prosecutor, “Is there a plea agreement in this case?”

- ! Prosecutor offers the plea agreement.

- ! Court asks defendant, “Do you have it in front of you?”

- ! Prosecutor summarizes the plea agreement.

- ! Court asks defendant, “Look at the last page. Is that your signature? Before you signed it, had you read all of it?”

- ! Had you discussed all of it with your lawyer?

- ! Do you understand it?

- ! Do you have any questions for me or your lawyer about it?

- ! Did you place your initials in front of every paragraph?

- ! Did you do that to indicate that you understood each of those paragraphs?

- ! Do you agree to be bound by the promises and representations in the plea agreement?

- ! [Note: If the plea agreement calls for a specific sentence or the dismissal of charges,] “Do you understand that it is still up to the judge who formally accepts your plea to determine whether to accept this plea agreement? If for any reason a judge were

not to accept this plea agreement, you would have the right to withdraw your plea and start over. Do you understand that?”

! Other than the promises made to you in the plea agreement, has anyone made any other promise or given you any assurance of any kind in an effort to get you to plead guilty?

! Has anyone tried to force, threaten, pressure, or coerce you to plead guilty?

10. The court reads or summarizes the indictment and states the elements of the offense.

! Do you understand what the government is claiming that you did wrong?

! Do you understand the elements of the offense?

! Have you discussed them with your lawyer?

! Ask the lawyer, “Do you think the defendant understands the elements of the offense?”

11. Factual basis. Determine whether the defendant admits guilt by reference to a stipulation in the plea agreement or by asking questions in open court.

! Ask the defense lawyer, “Do the discovery materials also support a factual basis for the plea?”

12. Maximum punishment. Describe the maximum punishment that can be imposed if the defendant pleads guilty. Describe mandatory minimum. Describe restitution. Describe collateral consequences of the plea including loss of licenses, deportation, loss of employment,

forfeiture, etc. If the offense involves fraud, discuss the obligation to notify victims.

13. Supervised release. Supervised release is a period following incarceration when your behavior is still supervised. During this time, you cannot commit crime, use drugs, possess a firearm, and there will be other conditions.

! If you violate any of the terms of your supervised release, you can be sent back to prison for the entire period of supervised release without getting any credit for the time you successfully completed. Give example.

! There are some conditions of a term of supervised release for which the court will have to revoke your term of supervised release if you violate them such as if you use controlled substances, refuse drug testing, or possess a firearm.

14. Let's talk now about how your sentence is going to be determined. You are going to be sentenced pursuant to the Sentencing Reform Act of 1984. It limits the discretion of the judge in fashioning an appropriate sentence. You will be sentenced using guidelines issued by our United States Sentencing Commission. In order to determine where your sentence should fall within these guidelines, the court will have the probation office prepare a presentence report. It will contain information provided by the government and information provided by you. If you disagree with any of the information in the presentence report, you will have the right to file objections. Those objections will be resolved at your sentencing. But, because that report has not yet been prepared, there is no way that anyone can sit here today and tell you what your sentence will be.

! Has anyone promised you what your sentence will be?

- ! Have you discussed with your attorney how these sentencing guidelines apply?
 - ! Do you understand that any stipulation that you have with the government will not be binding on the court?
 - ! Under some circumstances, the judge can impose a sentence that is either more severe or less severe than what the guidelines ordinarily require. These are called “departures.” Do you understand that?
15. Departure for substantial assistance. One example of a departure is a departure for substantial assistance that you can receive only if the government makes a motion for that departure at the time of sentencing. There are three things you should understand about the departure for substantial assistance.
- ! First, you can do absolutely everything that the government requires of you by way of cooperation and it is still not legally obligated to move for that departure at the time of sentencing.
 - ! Second, in order to get the benefit that can come from cooperation, your cooperation must be 100% truthful, not shaded in any way to help or hurt the government or to help or hurt anyone that the government is investigating. Do you understand that?
 - ! Third, the Judge still does not have to grant this motion.
16. Under some circumstances, you can appeal your guideline sentence. Under other circumstances, the government can. Do you understand that?

17. Parole has been abolished. You will not see a parole commission in prison about getting out early. Do you understand that?
18. Ask the defense lawyer, “You have done preliminary calculations as to how the guidelines apply?”
 - ! Ask the defendant, “Do you understand that the sentencing judge has the ultimate responsibility for determining your sentence and it may be different than what your lawyer thinks it should be?”
19. Finally, do you understand that you cannot withdraw your guilty plea simply because you disagree with how our probation office prepares the presentence report or because you disagree with the sentence that you receive?
20. Let’s now talk about what you give up by pleading guilty. You have the right to plead not guilty and to persist in that plea. Your case would be set for trial at which you would have the assistance of counsel at all stages.
 - ! It would be a speedy trial, meaning one set without unnecessary delay.
 - ! It would be a public trial, meaning that members of the public and the press could attend at will.
21. At trial, your case would be decided by a jury of 12 persons selected at random from the community.
 - ! You would be entitled to the **presumption of innocence** which means you could not be found guilty of any charge unless the government proves each and every element of that charge beyond a reasonable doubt.

- ! At trial, you would have the right to see and hear all of the government's witnesses testify under oath and have them cross-examined in your defense.
- ! You would have no burden to prove anything at trial but you would have the right to **compulsory process**, meaning subpoenas and other papers necessary to compel the attendance of witnesses at your request. The government is required to pay those expenses.
- ! You would have the right to be free from **self-incrimination** which means that no one could force you to testify but you could testify if you voluntarily elected to do so in your own defense. If you did not testify, the jury would be told that they could not hold that fact against you in determining whether you are guilty or not guilty.
- ! You have the right to have your case decided by a **unanimous jury verdict**. That means each and every member of the 12 person jury would have to agree before you could be found guilty of any offense.
- ! If you are convicted, you have the right to appeal and on appeal you will be given a free lawyer if you cannot afford one as well as a free transcript of the trial proceedings.
- ! Do you understand that you have the right to plead not guilty and to go to trial?
- ! Do you understand your rights that would attach at trial as I have just explained them to you?

- ! Do you understand that by entering a plea of guilty you waive or give up all of the rights that I have just described to you concerning a trial?
- ! There will be no further hearings except those necessary to determine your punishment.
- ! You will lose the right to vote, to serve on a jury, to hold public office, and to possess firearms or ammunition.
- ! Do you know what the word “voluntary” means?
- ! Is your decision to plead guilty voluntary?
- ! Given the circumstances that now confront you, do you believe that it is in your best interest?
- ! Ask counsel if they believe that the court has met the requirements of Rule 11 for taking a guilty plea.
- ! Do you have any questions for me or your lawyer before I call upon you to plead?
- ! Do you still want to plead guilty?
- ! Do you understand that if you plead guilty, it is extremely unlikely that you will ever be allowed to withdraw that plea?
- ! How do you plead, guilty or not guilty?

22. The court then makes findings concerning the voluntariness of the decision to plead guilty. “I find that you are fully competent and capable of entering an informed plea. I find that this is a voluntary decision that you are making after you have had a full and fair

opportunity to consult with your attorney. I find that your decision to plead guilty is not the result of threats, force, pressure, or coercion of any kind. It is not the result of any promises other than the promises contained in the plea agreement. I further find that I have advised you of the maximum punishment that can be imposed and you understand that. I have advised you of your right to trial by jury and you understand that by pleading guilty, you give up forever your right to a jury trial. I further find based on your statements that there is a factual basis to support your guilty plea in this case, meaning that you are in fact guilty of the offense. For those reasons, I recommend that the plea agreement be accepted and your plea of guilty be accepted as well.”

23. The presentence report that I referred to earlier will now be prepared by the probation office. As I told you, they will get information from the government and information from you. On every occasion during which the probation office speaks to you concerning these matters, you have the right to have your lawyer present. After the presentence report is prepared, you must discuss all of it with your attorney because it is only in that way that your attorney will be fully prepared to make those objections that can have a significant impact on the sentence that you will receive. Do you understand that?
24. Make decision concerning bond.